

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 97

FEBRUARY, 1949

No. 3

THE SUPREME COURT AND A CHANGING ANTITRUST CONCEPT

By LAURENCE I. WOOD †

The tri-partite division of powers, which is the pattern of our Constitutional government, contemplates individual supremacy in each branch—Executive, Legislative, and Judicial—save only as its powers may be subject to the checks and balances provided by the other two. There are, however, certain marginal areas wherein it is well nigh impossible for one branch to fulfill its assigned functions without impinging upon the designated prerogative of another.

Where the members of the federal judiciary are concerned with matters purely judicial in character, as in the interpretation and application of the Constitution and basic principles of law, their authority is solitary and supreme. But, to the extent that the activities of the Supreme Court involve the interpretation, the application, or the extension of federal statutes, the legislature is properly concerned in reviewing the activities and pronouncements of the Court. It is indeed true, as Charles Evans Hughes has said, that "the Constitution is what the judges say it is." But where federal statutes are concerned, the word of the Court should not be final, and the Congress is free to exercise a vigilant supervision over any interpretation or re-interpretation given its own handiwork.

† Member of the New York and Illinois Bars. Lecturer on Law, Rutgers University, 1947-48. Author of *PATENTS AND ANTITRUST LAW* (1942); *THE UNITED STATES PATENT SYSTEM: A SURVEY* (1946). Assistant General Counsel, General Electric Company. The views expressed herein are those of the author and do not necessarily represent those of the General Electric Company.

There has been much discussion in recent legal literature of the proposition that the Court has surrendered to "political activists" and that the doctrine of "judicial self-restraint" has fallen into desuetude.¹

Evidence in support of this charge has been gleaned primarily from the field of governmental regulation of business, as exemplified most dramatically in the antitrust area.

But a charge of legislative activity in this field cannot be levelled exclusively at the current court. For judicial drafting of the antitrust laws has been a constant process—delayed or hastened only in proportion to the activity of the law enforcement agencies—ever since the passage, in 1890, of the Sherman Act. Indeed, that Act by its very nature—being, as it is, a broadly phrased uncoded statute—has necessarily been built upon and has grown through a large body of interpretative decisions. Each new opinion constitutes a delineation of some aspect, large or small, of the over-all Sherman Act. Over the period of nearly sixty years, Supreme Court decisions have built up in many portions of the field a fairly complete framework against which business institutions and business practices can be measured.

The Congress has itself, from time to time, undertaken to add to this over-all framework through certain additional statutes such as the Federal Trade Commission Act, the Clayton Act, as amended by the Robinson-Patman Act, the Webb-Pomerene Act, and the Miller-Tydings amendment to the Sherman Act. Together with these statutory modifications the landmark cases in the field have come to present a more or less standard body of law, subject, of course to the flux of conditions both economic and political and to the growth which inevitably attends any field dealing with the relationship of government to business. Thus it is that with every decision the Court is, to the extent that the facts before it present novel questions as against those embodied in any previous decision, subject to the charge that it has legislated.

Certainly it has been true during the entire history of the anti-trust laws that the decisions of the Court have been based more on the contemporary economic or political views of the individual judges than on legislative history or judicial precedent. The Sherman Act is particularly susceptible to this practice, in part because of the lack of adequate precedent in many of the areas of this politico-economic field; more fundamentally, the tendency has arisen from the antipathy

1. See Schlesinger, *The Supreme Court: 1947*, FORTUNE, Jan., 1947, p. 73. This author divides the Court into what he calls the Black-Douglas group and the Frankfurter-Jackson group. The objective of the former is "the employment of the judicial power of their own conception of the social good"; of the latter: recognizing "the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn."

of the judges of one day toward the economic principles and philosophy of the earlier judges who wrote what had until then been the landmark decisions.

For the first twenty years of its existence the Sherman Act was construed as applying literally to every contract in restraint of trade;² in 1911 this doctrine was sharply reversed by the adoption of the "rule of reason" which specified that only those restraints or monopolies which were unreasonable came within the sanctions of the Act.³ This latter rule continued unabated until, within the past decade, the Court has undertaken to delineate certain species of restraints which it holds *per se* unreasonable, and hence without the protection of the "rule of reason."⁴ These major shifts in policy have been flanked by a multitude of relatively minor reversals and tangents in which the Court has at one time or another concluded that the Sherman Act has meant something very different from that which earlier members of the same Court had decreed.

There is—or should be—a sharp distinction between the two types of judicial activity. To the extent that the statute is but a broad precept proclaiming a worthwhile objective the members of the Court have no alternative but to give body to that statute by designating, as they are considered, the practices which fall within and those which fall without its prohibitions. Legislative though this activity be, it is the type of legislation which the Congress by its very vagueness has forced upon, and hence delegated to, the Court.⁵

The action of the Court, however, in cancelling out its own express additions to the statute is a far more serious type of practice. It is the unfortunate fact that the present Court has been, more than any

2. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897).

3. *Standard Oil Company v. United States*, 221 U. S. 1 (1911); *United States v. American Tobacco Company*, 221 U. S. 106 (1911).

4. *United States v. Socony-Vacuum Co.*, 310 U. S. 150 (1940); *International Salt Co. v. United States*, 332 U. S. 392 (1947). See *United States v. Columbia Steel*, 334 U. S. 495, 524 (1948). A parallel shift in emphasis in the concept of monopoly has occurred since 1911, when the Court in *Standard Oil Co. v. United States*, 221 U. S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U. S. 106 (1911), relied on a record of both predatory tactics and an "overwhelming" share of the market. In *United States v. United States Steel Corp.*, 251 U. S. 417 (1920), and *United States v. International Harvester Co.*, 274 U. S. 693 (1927), the Court made it clear that it was not the size, but the tactics which made for illegality. In the subsequent *United States v. Swift and Co.*, 286 U. S. 106 (1932), and *United States v. Aluminum Co.*, 148 F. 2d 416 (2d Cir. 1945), the concept was reversed so that size, *i. e.*, market control—not predatory acts, became the criterion of innocence or guilt. See Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1306-9 (1948).

5. See Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A. B. A. J. 535, 537 (1948): ". . . The unfortunate fact is that neither Congress in the choice of language it will use, nor the Courts in the meanings they will ascribe to Congress, have really effective guidance from consistently accepted principles of interpretation. . . . For the individual justice to be left so much at large presents opportunity and temptation to adopt interpretations that fit his predilections as to what he would like the statute to mean if he were a legislator. Indeed, sometimes there is not much else to guide him. . . ."

other in the history of the Act, prone to disregard the rulings of earlier trade regulation cases. Indeed, the ascendancy in the Supreme Court of this "political activist" philosophy⁶ has, within the past few years, threatened the framework of this entire body of law. This has been evidenced in an increasingly wholesale disregard for judicial precedent in the antitrust field, as well as for the legislative history—no matter how clear or emphatic in the Congressional reports—of various federal statutes.

The proper criticism of this practice is not that it constitutes legislating—for in the vacant areas that is what the Court must do. Rather the proper protest must be against the fact that the Court is relegating *stare decisis* to the scrap heap and that it seems to be taking it unto itself to remake the law to conform to its own ideas of what is proper, what is morally just, and what is economically sound.

Criticism of this trend is by no means to be understood as an expression of opinion on the merits of any case, nor necessarily of the result reached by the Court. Certainly, all recognize the continuing need for vigilant enforcement of the antitrust laws. The issue is rather of the propriety of the judges' self-assumed role of reshaping those laws to make illegal practices which were previously held to be legal or which were clearly not intended to be outlawed by the Congress in enacting that legislation.⁷

A corollary but important problem arises in connection with the inevitable widespread feeling of uneasiness and suspicion which permeates the business community where the law is powerful but unsettled, vigorous but vague. The businessman and his advisers are scarcely to be blamed for a feeling of intense bitterness against a system of law whereby it is possible for a defendant to be convicted of a crime

6. *Id.* at 536: ". . . to observe the democratic separation of functions so as to leave policy making to the political bodies and make the function of interpretation a professional matter, requires training, constant intellectual effort, deliberation and detachment. . . ."

That these are perhaps not always the underlying factors in federal judicial appointments, see Wiley, *A Free Judiciary*, 34 A. B. A. J. 441, 442 (1948). Since 1932, of 231 federal judges appointed, 214 were Democrats; 17 Republicans. "It seems painfully apparent that political allegiance was the one factor which dominated appointments."

7. ". . . The prestige of the Court is threatened, if it has not already been seriously impaired, by recent divisions of opinion within the Court and its reversal of precedents that had come to be regarded as enduring landmarks of the law. . . ." Palmer, *Dissents and Overrulings: A Study of Developments in the Supreme Court*, 34 A. B. A. J. 554 (1948).

"The question is what standards shall control judicial lawmaking. . . . The adherents of Frankfurter feel that Black and Douglas, by substituting their own for the legislative preference, tend toward a state of judicial despotism that threatens the democratic process. All legislation in a democracy, they point out, is the product of compromise among conflicting interests. The rough intrusion of the Court into this delicate equipoise may well upset a precarious balance of social forces. . . ." Schlesinger, *supra* note 1, at 206.

for the doing of acts which have until then been held to be proper, simply because the present members of that tribunal do not agree with those who previously comprised the Supreme Court. In the words of Mr. Justice Jackson, “. . . Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common-law process would become the most intolerable kind of *ex post facto* judicial law-making . . .”⁸

There has thus been developing in recent years what appears to be an attempt toward a substantial rewriting of the law in the anti-trust field by members of the Supreme Court.

It will be our attempt to review the developments of this law in some of its more important aspects, as those developments have been effected by recent Supreme Court decisions.

THE UNITED STATES PATENT SYSTEM

The patent statutes have been developed, codified, and amplified over a period of some 160 years. They are based, of course, upon Article I, Section 8, of the Constitution which provides for the grant by Congress to inventors of the exclusive right to their discoveries for a limited period of time. It is universally accepted that the patent system has played a most important part in the development of our economy—this recognition coming from those who are opposed to the present form of the system, as well as from those who are its staunchest advocates. In the main, the system has remained virtually unchanged in the past 100 years, although it has, of course, undergone many amendments and revisions designed to coordinate it with the vast growth of our economy and our industry.

The system in its present form has been generally acclaimed by groups such as President Roosevelt's National Patent Planning Commission; in some of its aspects it has been harshly criticized by groups such as the TNEC. Both of these bodies submitted to Congress recommendations for changes which they thought would be beneficial to the patent system. Those presented by the National Patent Planning Commission were directed toward the more efficient administration of the patent laws, for the purpose of providing better protection for inventors and of eliminating certain abuses which have arisen in the many technical aspects of Patent Office procedure. The recommendations of the TNEC were in the direction of removing the exclusiveness of the patent grant and narrowing its scope. It is significant that none of these proposals which sought to narrow, reduce, or materially

8. Jackson, *Decisional Law and Stare Decisis*, 30 A. B. A. J. 334 (1944).

alter the scope of the protection given to the patentee has been adopted by Congress, or even received favorable committee action.

The Supreme Court, however, has—in part at the instance of the Antitrust Division, which group was a predominant factor in the TNEC recommendations—made a most drastic series of changes in the entire structure of the patent system. Its decisions have resulted in an increasingly constant attrition in the scope and value of the patent grant.

A. *Contributory Infringement*

In the last ten years the Supreme Court has, by a series of decisions, virtually abolished the doctrine of contributory infringement—a doctrine which had been recognized by all federal courts in a consistent line of decisions over the past seventy years. This doctrine arose from the application to the patent law of the general legal principle that one who causes a wrong is as guilty as one who actually commits the wrong. The doctrine was developed by the courts to prohibit not only the actual infringement of the patent but also the direct inducement of infringement by supplying someone else with the means and directions for infringing the patent. One who makes a special device constituting the heart of a patented machine and supplies it to others with directions to complete the machine is obviously appropriating the benefit of the patented invention.

Where a patent is being thus infringed by a large number of scattered individuals all of whom have been caused to infringe by the same person, the practical way to stop the infringement is to sue the one causing the infringement, rather than the multitude of persons who are directly infringing. In the case of many inventions—especially chemical processes or combination or system patents—such a contributory infringement suit is the only practicable way of enforcing the patent, as where the persons directly infringing the patent claims are the ultimate users or consumers.

It is for this reason that this doctrine has been characterized by Mr. Justice Frankfurter as “an expression both of law and morals.”⁹

But in a series of recent cases¹⁰ the Supreme Court has virtually abolished the patentees’ right to protection against contributory infringement. It has done this by the simple expedient of refusing relief

9. *Mercoid Corp. v. Mid-Continent*, 320 U. S. 661, 667 (1944) (dissenting opinion).

10. *Carbice Corp. v. American Patents Development Corp.*, 283 U. S. 27 (1931); *Leitch Mfg. Co. v. Barber Co.*, 302 U. S. 458 (1938); *B. B. Chemical Co. v. Ellis*, 314 U. S. 495 (1942); *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944); *Mercoid Corp. v. Mid-Continent*, 320 U. S. 661 (1944). See, generally, Wood, *Tangle of Mercoid Implications*, 13 GEO. WASH. L. REV. 61 (1944).

to a patentee suing the one supplying the material inducing the infringement.

This has grown from the Court's own doctrine of "misuse of patents" (first expressed in these cases). This doctrine was born of a proper purpose, for it was aimed at several flagrant instances wherein a patent had been used to gain control over the marketing of an unpatented staple, used in connection with the patent. The Court met the situation by deciding that it would, as a dispenser of equity, withhold its aid from one thus seeking to extend the scope of his patent. And, the court concludes, if a patentee sues to enjoin someone from selling an unpatented material he must be extending the protection afforded by the patent. The difficulty is that this ignores the fact that in the traditional contributory infringement case all that the court is asked to enjoin is the sale of an unpatented material sold *for the purpose of inducing infringement of the patent*—a sale which the supplier has no legal right to make.

So far have the courts gone in their anxiety to confine the patent's scope that they will even refuse relief against a *direct* infringer where they conclude that the suit against him is but a circuitous means of stopping the contributory infringer who cannot be directly sued.¹¹

Although actions for contributory infringement are not directly outlawed, the Court now seems to hold that the mere act of bringing the suit constitutes a violation of the antitrust laws, since it is an attempt to control an unpatented commodity.¹² This doctrine is so complex and confused that no court and no patent attorney can be sure in any given fact situation as to whether the use is proper or whether it is such as will deny the patent owner the relief to which he is by statute entitled. To the protests of the patentees that the application of this doctrine is vitiating whole categories of patents, authorized by statute to be issued, the courts give an unsympathetic shrug.¹³ Thus, through purely "judicial" activity, many inventors have been denied the right to exploit or utilize their patents in connection with their business. This is so no matter how innocent their intention may be; it applies indiscriminately to the exploitation of whole classes of patents—patents authorized by law to be issued by

11. *B. B. Chemical Co. v. Ellis*, *supra* note 10; *American Lecithin Co. v. Warfield*, 105 F. 2d 207 (7th Cir. 1939), *cert. denied*, 308 U. S. 609 (1939).

12. *Mercoid Corp. v. Mid-Continent*, 320 U. S. 661 (1944). That this is doctrinally unsound, see Roberts, J., dissenting, at 674. See also Wood, *Tangle of Mercoid Case Implications*, 13 GEO. WASH. L. REV. 64, 66 (1944).

13. *B. B. Chemical Co. v. Ellis*, 314 U. S. 495, 498 (1942): "It is without significance that . . . it is not practicable to exploit the patent right by granting licenses. . . . The patent monopoly is not enlarged by reason of the fact that . . . he cannot avail himself of its benefits within the limits of the grant."

the U. S. Patent Office. This situation is so obviously unfair and unsatisfactory that steps have already been undertaken to correct it.¹⁴

B. *License Limitations*

One of the most significant areas of the antitrust field is that which involves the validity of price restrictions or limitations imposed by the patentee upon his licensees. It has, since 1902, been the accepted construction of the Sherman Act and of the patent statutes that these restrictions, imposed by a patent owner when he issues a license under his patent, are properly within the scope of the patent grant.¹⁵ This rule was reaffirmed and reapplied by a unanimous court in 1926 in *United States v. General Electric*, the Court stating that such a limitation is entirely proper, "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."¹⁶

Despite the clarity and unanimity of these decisions, the Department of Justice has, ever since 1937, made no secret of the fact that it was antipathetic to that rule and that it considered it to be inimical to its efforts to enforce the Sherman Act. The Antitrust Division accordingly attempted both through the recommendations of the TNEC, and through its own representatives before the Congress, to have the statutes amended to remove this area from the legitimate scope of the patent grant. These repeated efforts to obtain Congressional amendment were unsuccessful despite prolonged and actively conducted hearings by several Congressional committees.¹⁷ The National Patent Planning Commission recommended to the President and to Congress that no such change be made.¹⁸

14. *Hearings of House Judiciary Committee on H. R. 5988*, 80th Cong., 2d Sess. (1948). The Subcommittee on Patents favorably reported the bill to the Judiciary Committee. The Supreme Court has also in recent years made large inroads on the doctrine of estoppel as it applies to patent licensees and patent assignees. Over the period of nearly a century, the Court evolved and applied the doctrine that an inventor who assigned his patent to another could not thereafter challenge the validity of his own invention. Similarly, it was held that one who took a license under a patent could not be heard to attack the validity of the patent. The Supreme Court has now decided that those doctrines have, in large part, been wrongly applied over the past many years. *Katsinger v. Chicago Metallic*, 329 U. S. 394 (1947); *Scott v. Marcalus*, 326 U. S. 249 (1945).

15. *Bement v. National Harrow Co.*, 186 U. S. 70 (1902). See, generally, for a review of the development of the law in this field, Wood, *Patent Combinations and the Anti-Trust Laws*, 17 GEO. WASH. L. REV. 59 (1948).

16. 272 U. S. 476, 490 (1926).

17. For example, see *Hearings before Committee on Patents on S. 2303 and S. 2491*, 77th Cong., 2d Sess. (1942); *Hearings before Committee on Military Affairs, Subcommittee on Technological Mobilization on S. 2721*, 77th Cong., 2d Sess. (1942); *Hearings before Committee on Military Affairs, Subcommittee on Technological Mobilization on S. 702*, 78th Cong., 1st Sess. (1943).

18. Such a change "would not be a beneficial innovation in our patent system." H. R. Doc. No. 239, 78th Cong., 1st Sess. 24 (1943).

Concurrent with and despite the unsuccessful legislative campaign was a much more successful effort to obtain court revision of the law. Since 1938 the Supreme Court has in a series of decisions made increasingly sharp inroads on the doctrine which permits a patentee to impose reasonable limitations upon licensees under his patent.¹⁹ In March, 1948, the decision of the Supreme Court in the *Line Material* case "practically overruled", in the words of Attorney General Clark, the decisions which have for over 45 years upheld this right as part of the patentee's prerogative.²⁰

Seeming support is given to this too extreme interpretation by the dictum of Mr. Justice Douglas in the subsequent *Paramount* case²¹ wherein he apparently construes the *General Electric* decision as permitting a patentee to fix the prices of one licensee only, an interpretation which would surely have surprised not only the nine judges deciding the earlier case, but also any subsequent court.²²

Certainly in the whole area of license restrictions the situation is confused and uncertain. Since the penalty for "improper" actions in the field is to be held to have violated the antitrust law—a statute of criminal as well as civil penalties—it is obvious that the uncertainty and confusion, which are sufficient to baffle the most renowned experts in the field, cannot but be exasperating and serious to the businessmen faced with the practical problem of utilizing their property rights in

19. Cf. *Interstate Circuit v. United States*, 306 U. S. 208 (1939); *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436 (1940); *United States v. Univis Lens Co.*, 316 U. S. 241 (1942); *United States v. U. S. Gypsum Co.*, 333 U. S. 364 (1948). Each of these cases distinguished, without finding it necessary to pass upon, the *General Electric* case. All involved licensed price control provisions; all were held illegal.

20. 333 U. S. 287 (1948). Actually the eight judges participating were evenly divided on sustaining the *General Electric* decision. Mr. Justice Reed, in writing the prevailing opinion, approved of the *General Electric* opinion, but held it inapplicable to the facts presented. Mr. Justice Jackson disqualified himself. It is presumed, in the light of his contemporaneous opinion in *United States v. South Buffalo Railway Co.*, 334 U. S. 771 (1948), that he would vote to sustain the earlier Court interpretation of the statutes involved. Even on this assumption, Mr. Justice Reed's will remain the deciding vote.

21. See *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 144 (1948). This was a seven justice opinion; no justice expressed disagreement with this dictum.

22. "A, a proprietor of a patent, licenses C, D, and E to manufacture the patented article and to sell it for not less than a stated price. The condition of the license fixing the price is not illegal." RESTATEMENT, CONTRACTS §515, comment 12 (1932). *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 456 (1940): "He [the patentee] may grant licenses . . . restricted in point of space or time, or with any other restriction . . ."; *Interstate Circuit v. United States*, 306 U. S. 208, 228 (1939): "Granted that each distributor . . . was free to impose the present restrictions upon his licensees. . . ." Cf. Mr. Justice Reed in *United States v. Line Material Co.*, 333 U. S. 287, 311: "Where two or more patentees with competitive, non-infringing patents combine them and fix prices . . . competition is impeded to a greater degree than where a single patentee fixes prices for his licensees." Mr. Justice Douglas, *id.* at 315-6: ". . . it is a part of practical wisdom and good law not to permit *United States v. General Electric Co.* to govern this situation, though if its premise be accepted, logic might make its application to this case [of ten licensees] wholly defensible." (Emphasis added.)

the most feasible fashion. For the likelihood of being held to have been in criminal misuse of patent rights simply because of a technical construction of the Sherman Act, pursuant to the current economic belief of the Supreme Court, is a very real one.²³ So complete is this uncertainty and confusion that the most distinguished judges hesitate to pass on questions of law in this field. Judge Learned Hand in the *Aluminum Company* case expressly refused to pass on a question presented on the ground that "the whole subject is plainly in flux, and we do not wish to pass upon it unless we have to do so."²⁴ Yet, under the recent Supreme Court decisions, if a patent owner is to utilize his property actively in his business, he must resolve the same doubts at the peril of a criminal conviction.

C. Government Attacks on Validity

In 1897 the Supreme Court laid down the rule that where a patent has been issued by the Patent Office, the Department of Justice may not, in a suit to cancel the patent, subsequently attack the decision of the Patent Office on the ground that the invention was not truly patentable.²⁵

For the question of patentability is the very issue which the Government passes on in the exercise of its quasi-judicial function²⁶ of granting the patent, through the trained experts of the Patent Office. Once that determination was made and the patent issued, the inventor was to be entitled to rely on the protection which it gives.

There has recently been an increasing controversy as to whether this doctrine of estoppel was to prevent an attack by the government on the validity of its own patents in an antitrust action.²⁷ The at-

23. At the trial in the *Carboloy* case, Judge Knox asked Government Counsel: "Suppose the defendants acted in good faith, honestly believing the patent to be valid: Could they be convicted in a criminal prosecution?"

Mr. Berman: "I think, your Honor, I would have to say they could, because it is our position, and I think a position in which the cases sustain us, that the good faith of the defendants is an immaterial issue in an antitrust case." Transcript of Record, p. 1725, *United States v. Carboloy*, 80 F. Supp. 989 (S. D. N. Y. 1948).

24. *United States v. Aluminum Co. of America*, 148 F.2d 416, 438 (2d Cir. 1945).

25. *United States v. American Bell Telephone Co.*, 167 U. S. 224 (1897).

26. See *Butterworth v. Hoe*, 112 U. S. 50, 67 (1884).

27. Compare *United States v. Porcelain Appliance Corp.*, Equity No. 1640, N. D. Ohio, 1926 (defendant's motion in antitrust suit to strike plaintiff's allegations of patent invalidity denied); *Crosby Steam Gage and Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972 (D. Mass. 1943) (Government's motion to intervene, alleging in part the invalidity of plaintiff's patent, was granted over plaintiff's opposition); with *United States v. Hartford-Empire*, N. D. Ohio, 1946 (Government's attempt to attack validity of patents in proceedings before Master denied); *United States v. Gypsum Co.*, 53 F. Supp. 889 (D. D. C. 1943) (Government may not attack validity of patents in antitrust suit). *United States v. American Optical Co.*, Civil No. 10-391, S. D. N. Y., 1948 (court refused to permit Government to attack patent's validity in antitrust suit); *International Business Machines v. United States*, 298 U. S. 131, 137 (1936) ("... in every suit brought to set aside the tying clause ... the suit could usually result in no binding adjudication as to the validity of the patent, since infringement would not be in issue").

tempted attack was for the purpose of having held illegal practices entered into in reliance on the existence of the patents.

Under the long line of decisions already referred to, it has been recognized that the patentee, as part of the legitimate exploitation of his patent, may impose certain limitations as to territory, type, quantity, price, or use.²⁸ But such restrictions might well be violative of the Sherman Act if imposed in the absence of a valid patent grant.

The Department of Justice and others have sought repeatedly, over a period of years, to have Congress change or limit the rule of the *Telephone* case to permit an attack on the validity of patents in an antitrust suit.²⁹ Congress has persistently refused to so rewrite the law.

The Department's argument has been that inasmuch as it was free to attack the validity of patents asserted against it in the Court of Claims,³⁰ it would be inconsistent to deny it a similar freedom in antitrust proceedings.³¹ The logical appeal of this argument is apparent; its weakness lies in its *ex post facto* effects.

For where a patentee in good faith reliance on his patent enters into bona fide agreements—perfectly proper under the present law—it is harsh, indeed, to subject him to retroactive civil and criminal liability by allowing a subsequent attack on the patent as a means of rendering "illegal" all he did pursuant to it. If such an attack were to be permitted, it would mean that the court could send the inventor and his licensee to jail because they relied upon a patent issued by the Government.³² Certainly, if the United States Patent Office believed that a real invention had been made, it was scarcely unreasonable—let alone criminal—for the inventor to act to build up his business in reliance on the grant.

The interests of both the public and the individual patent owner would appear to be best reconciled by a rule permitting the Government to question the validity of the patent in such suits, but to deny any retroactive effect to the determination.

In the *Gypsum* case, the Supreme Court, in a "deliberate" dictum,³³ appears to have gone beyond any such middle ground, Mr.

28. McCormack, *Restrictive Patent Licenses and Restraint of Trade*, 31 COL. L. REV. 743 (1931).

29. Cf. H. R. 97, 79th Cong., 1st Sess. (1945); H. R. 3462, 79th Cong., 1st Sess. (1945); S. 2482, 79th Cong., 2d Sess. (1946).

30. *Farnham v. United States*, 49 Ct. Cl. 19 (1913); *Morse Arms Co. v. United States*, 16 Ct. Cl. 296 (1880).

31. See Government Memorandum On Its Right to Show Invalidity of Hartford's Patents, pp. 22-26, *United States v. Hartford-Empire Co.*, N. D. Ohio, 1948.

32. See note 23 *supra*. This problem is of course distinct from that wherein the patents are used as a mere excuse for imposing the restrictions, with no bona fide belief in their validity. Cf. the *Gypsum* case, note 19 *supra*.

33. See Mr. Justice Frankfurter, concurring in *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 408 (1948).

Justice Reed stating that in an equity antitrust case the Government "should have the . . . opportunity to show that the asserted shield of patentability does not exist."³⁴ Were the same rule to be applied to criminal prosecutions it is apparent that a serious problem of judicial *ex post facto* law-making would arise.

D. Effect on the Patent System

Any Sherman Act proceeding, civil or criminal, is a serious matter. The damage which may result from the foregoing changes in the patent system is enormous, for it may be argued that they threaten the very incentive which it is the purpose of the patent laws to create.

The depreciation in the value of the patent property right which results from these decisions is, of course, tremendous, and there is legitimate cause for concern lest these cases have so completely rewritten the patent statutes in regard to the antitrust laws that the incentives intended by the Constitution and the Congress to be furnished through the patent system may be seriously impaired.³⁵

34. *Id.* at 371. The opinion of the statutory three-judge court in *United States v. U. S. Gypsum Co.*, 53 F. Supp. 889 (D. D. C. 1943), was thereby reversed. Judge Stephens of the lower court had said that if any change were to be made in the rule of law, it should be made by legislation and not by the courts.

The statement finds support in a number of isolated intimations found in Supreme Court opinions in civil antitrust suits:

"The Government has not put in issue the validity of the lens patents, but argues that their scope does not extend beyond the structure of the lens blanks and consequently afford no basis for the Corporation's restrictions on the sale of the finished lenses which the wholesalers and finishing retailers fashion from blanks purchased from the Lens Company. . . . The record gives no account of the prior art and does not provide us with other material to which, if available, resort might *appropriately* be had in determining the nature of an alleged invention and the *validity* and *scope* of the patent claims founded." (Emphasis added.) *United States v. Univis Lens Co.*, 316 U. S. 241, 248 (1942).

"Inasmuch as the Government did not appeal from these findings, we need not consider . . . the validity or scope of the . . . patents." *United States v. Standard Oil Co.*, 283 U. S. 163, 181 (1931).

"In considering that question we assume the validity of the patents which is not questioned here." *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 456 (1940).

"We assume *arguendo* that the patents in question . . . are valid." *United States v. Masonite Corp.*, 316 U. S. 265, 276 (1942).

35. Another important illustration of judicial revision of a law which Congress failed to rewrite is in those cases where patents have been misused. Here the Court has taken it unto itself to provide for compulsory licensing of patents—a remedy which Congress has repeatedly been asked, for over thirty-five years, to provide and has consistently failed to enact. *Oldfield Hearings, Pursuant to H. R. 23*, 62d Cong., 2d Sess. 417 (1912); *Stanley Bill Hearings, Senate Patent Committee*, 67th Cong., 2d Sess. (1922); *McFarlane Hearings on Compulsory Licensing*, 75th Cong., 3rd Sess. (1938). And see THE FINAL REPORT OF THE TNEC (1941).

In *Hartford-Empire Co. v. United States*, 323 U. S. 386 (1945), *on rehearing*, 324 U. S. 570 (1945), perpetual compulsory licensing was decreed under patents which had been granted to members of an illegal conspiracy; and in *United States v. National Lead Co.*, 332 U. S. 319 (1947), the Court provided that there should be compulsory licensing under all patents owned by the defendants or which they might acquire within five years after the decree. Similarly, in the "misuse" cases the Court has refused to enforce patents authorized by statute to be granted, where the ultimate basis

THE FEDERAL TRADE COMMISSION FIELD

A. *The Administrative Procedure Act*

Congress in the new Administrative Procedure Act³⁶ expressly provides that persons subject to proceedings before administrative tribunals are entitled to have the findings of those tribunals passed upon by a reviewing court, that the reviewing Court is to consider the defendants' contention that the findings are "unsupported by substantial evidence . . .", and that the court is to "review the whole record" in making such determinations. Yet there is little indication in the opinion of the Supreme Court in the *Cement* case that those explicit instructions were heeded.³⁷ Although making occasional use of the phrase "substantial evidence", the Court stated that its "problem in reviewing the findings in this case" as made by the FTC was "whether the Commission[']s . . . findings of concerted action . . . are supported by evidence. . . ."³⁸ After emphasizing the great weight which it attaches to the Federal Trade Commission's findings, the Court concluded simply: "We think . . . that the findings have support in the evidence."³⁹ It is difficult to believe that such a legislative requirement can ever be effective so long as the Commission cases continue in such gigantic proportions. The *Cement* record was of "incredible size,"^{39a} some one hundred thousand pages. Certainly it is impossible for appellate judges to absorb more than a fraction of such a massing of testimony piled upon exhibits. It is scarcely surprising that in such circumstances "there is no tendency for mistakes on the facts to be corrected by the higher tribunals."^{39b}

for the denial of relief frequently lies in the fact that the patentee can exploit his patent only in a given way—a way of which the Court does not approve.

See also *Alden-Rochelle, Inc. v. ASCAP*, Civil No. 18-6, S. D. N. Y., Oct., 1948, where Judge Leibell, having found certain of ASCAP's practices to be illegal enjoined ASCAP "from attempting directly or indirectly to enforce the motion picture performing rights of any musical compositions against any one as long as ASCAP continues as an illegal combination and monopoly . . .," and a similar prohibition restraining the individual members of ASCAP "while they continue as members of ASCAP."

36. 60 STAT. 243, 5 U. S. C. A. § 1009 (Supp. 1947).

37. *FTC v. Cement Institute*, 333 U. S. 683 (1948). The Act became effective nine days before the Circuit Court of Appeals decision. The Supreme Court failed to mention the Act.

38. *Id.* at 709. Cf. *id.* at 712, 719.

39. *Id.* at 709. The Court concludes its discussion of the special plea of several West Coast companies by saying: "Our conclusion is that there was evidence to support the Commission's findings. . . ." *Id.* at 720.

Cf. *Allied Paper Mills v. Federal Trade Commission*, Supreme Court Docket No. 477, Petition for Certiorari filed December 23, 1948, on the ground that the court of appeals did not give an adequate review of the record as required by the Act. The court of appeals opinion is reported at 168 F. 2d 600 (7th Cir. 1948).

39a. *Adelman, supra* note 4, at 1340.

39b. *Id.* at 1344. ". . . if we are to have judicial review, some way must be found of distilling the facts and making their implications clear to the Courts."

B. "Unfair Methods of Competition"

In the interpretation of the Federal Trade Commission Act itself, the Court, in the *Cement* case, in effect over-ruled a twenty-eight year old judicial landmark. The Federal Trade Commission Act provides that the FTC shall have authority to issue cease and desist orders against "unfair methods of competition." The Supreme Court ruled in *FTC v. Gratz*⁴⁰ that this delegation to the Commission was, of course, subject to the review of the Courts and that what was to constitute an unfair method of competition must be in the final analysis a matter for judicial determination, not for ultimate decision by an administrative body.⁴¹ With this policy laid down as a guide to the Commission and the Courts, Congress not only did not undertake to dispute the interpretation of the *Gratz* case but, indeed, in the Administrative Procedure Act it strengthened that decision, stipulating that in all such administrative proceedings the final interpretation of every statute and of every question of law was to be for the Courts.⁴²

Yet, in the *Cement Institute* case the Supreme Court goes out of its way to indicate its complete want of sympathy with its rule in the *Gratz* case and to say that it will accept not only the findings of the Commission—so long as there is some evidence to support those findings—but also the conclusions of law made by the Commission as to what constitutes an unfair method of competition. This complete reliance is on the rather remarkable ground that the Commission constitutes a group of "experts" who must accordingly be given a free hand in determining what constitutes an "unfair trade practice." This presumably leaves it entirely to the whim of the five Commissioners to decide what business practices—no matter how widely used, no matter how historic or how valuable those practices may be—are to be held to be illegal and violative of law.⁴³

A member of the Commission has testified before a Senate committee since this decision that with the law as it now is, "We don't have to find anybody guilty of violating any law in order to get a cease and desist order . . . I have made the charge every time I talk to any businessman. I ask if there is anyone willing to stand up and come forward. I will get a cease and desist order against him."⁴⁴

40. 253 U. S. 421 (1920). See *FTC v. Keppel*, 291 U. S. 304, 314 (1934).

41. 253 U. S. 421, 427 (1920). "It is for the courts, not the Commission, ultimately to determine as a matter of law what they [the words 'unfair methods of competition'] include."

42. 60 STAT. 243, 5 U. S. C. A. § 1009(e) (Supp. 1947).

43. See Mr. Justice Jackson, dissenting in *FTC v. Morton Salt Co.*, 334 U. S. 37, 58 (1948), protesting against "the almost absolute subservience of judicial judgment to administrative experience [which] means that judicial review is a word of promise to the ear to be broken to the hope."

44. Testimony of Lowell Mason, *Hearings before the Trade Policies Subcommittee of Senate Interstate Commerce Committee*, 80th Cong., 2d Sess. 174, 178 (1948).

The Court in the *Cement* case upheld the Commission's conclusion that concerted multiple use of a basing point pricing system constituted an "unfair method of competition."⁴⁵ In the *Rigid Conduit* case this rule has been applied to prohibit even individual use of a basing point delivered price system.⁴⁶ These holdings are despite the fact that both the Supreme Court and Congress had previously refused to declare the system illegal.

C. The Robinson-Patman Act

One of the most extreme instances of disregard of the express intention of the lawmakers arises again in the *Cement* case, in connection with the interpretation of the Robinson-Patman Act. This law was enacted in 1936, as an amendment to the Clayton Act, for the purpose of outlawing certain types of discriminations. Congress in enacting the new law rejected squarely the Commission's theory that all basing point systems and all delivered price systems should be outlawed. The House Judiciary Committee voted unanimously to strike

45. Adelman, *supra* note 4, at 1342: "I am unable to find a definition of the prohibited action in Mr. Justice Black's opinion. But the following would not, I think, be inconsistent with it: 'Any series of actions by a group of business firms—not necessarily involving each of them at every moment of time, and not necessarily governed by an express or implied agreement, but operating under reasonably high probabilities of each others' response—which tends to inhibit competition by producing a system of identical delivered prices in a given market. . . . it is difficult to imagine a basing-point system which would not be considered as 'unfair competition.'" Compare this standard with *Cement Manufacturers Association v. United States*, 268 U. S. 588 (1926).

46. *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d 175 (7th Cir. 1948). Congress has refused, after repeated requests, to outlaw basing point pricing. See *Hearings before Senate Committee on Interstate Commerce on the Wheeler Bill*, S. 4055, 74th Cong., 2d Sess. (1936), popularly referred to as the "Anti-Basing-Point Bill." One of the Commissioners there testified: "It is a matter of policy for Congress to determine whether the employment of the basing point systems shall be specifically banned by statute. . . ." *Id.* at 325. After extensive hearings the Committee let the bill drop, without a report.

The furore and widespread demand for legislative reform which has followed upon these decisions has led to an interesting anomaly. The Commission and its friends now insist that these decisions do not mean that for which the Commission has long contended, and those who oppose any requirements that their systems of selling be changed now insist that the courts have already ordered such a change. Thus, those who support the Commission contend that the *Rigid Conduit* case does not outlaw individual use of a basing-point system.

See Edwards, *Speech Before Small Business Advisory Committee for FTC*, December 1, 1948: "Count II [of the *Rigid Conduit* case] amounts to a decision that it is an unfair method of competition for an individual to participate in a tacit conspiracy." And see Zlinkoff and Barnard, *Basing Point and Quantity Discounts: The Supreme Court and a Competitive Economy*, 1947 Term, 48 Col. L. Rev. 985, 1005 (1948): "Read carefully, the opinion of the court does not hold, nor did the Commission contend, that individual freight absorption is illegal *per se*."

But see the statement of the counsel for the Commission on the oral argument: ". . . We have a Count II that is founded upon Section 5 of the Federal Trade Commission Act, and we had no such question in the *Cement* case, in that Count II herein is not grounded upon combination or conspiracy, but solely upon the use of each petitioner of the basing-point system, and the effect of that use upon competition." Transcript of Record, p. 3692, *Triangle Conduit & Cable Co., supra*. In connection with the same case counsel for the Commission said, ". . . in the *Conduit* case, Count II raises the question of the status of the basing-point practice as an unfair method of competition and independently of the question of conspiracy."

from the bill language which would have accomplished these purposes, with the statement that otherwise the bill could not be passed.⁴⁷ Accordingly, the Robinson-Patman Act proceeded to become law without the language which would have achieved what the Commission was seeking. Nevertheless, since that time the Commission has sought, in a progressive series of cases, gradually to approach through the medium of the courts the identical objective rejected by Congress. It has done this by construing the language of the Robinson-Patman Act as prohibiting discrimination between "mill-net" prices—the interpretation rejected by Congress, and one which can logically lead only to the outlawing of all uniform delivered price systems.⁴⁸

Although the deliberate disregard of the legislative history thus displayed by the Commission was pointed out to the Supreme Court in the *Cement* case, that tribunal there accepted, at least for some purposes, the same "mill-net" interpretation of price which the Congress rejected.⁴⁹ The Court used that interpretation of the Robinson-Patman

47. See statements by Congressmen Patman, 80 CONG. REC. 7760 (1936), and Boileau, 80 CONG. REC. 8122 (1936). Senators Borah and Van Nuys agreed that the bill as finally passed had no effect on basing points. 80 CONG. REC. 9903-4 (1936).

See *Corn Products Refining Co. v. FTC*, 324 U. S. 726, 736-7 (1945), where Chief Justice Stone pointed out that the foregoing legislative history evidenced the clear intention of Congress not to make the use of basing-point systems illegal *per se*: "Such a drastic change in existing pricing systems, as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 CONG. REC. 8102, 8140, 8224. We think this legislative history indicated only that Congress was unwilling to require f. o. b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal *per se*." (Emphasis added.)

48. Head, *Validity Under the Robinson-Patman Act of a Uniform Delivered Price of One Seller*, 31 MINN. L. REV. 599 (1947); Head, *The Basing Point Cases*, 26 HARV. BUS. REV. 641 (1948). The "mill-net" theory is, briefly, that the "price" in which there must be no discrimination between competing customers is the price at the mill, exclusive of all freight. The result of such a theory is that to charge the same price to two different locales would be an illegal price discrimination. The court also neatly plugged the only remaining loophole by rejecting the defense of meeting competition in "good faith" which is provided by the Act. "Nor can we discern . . . any distinction between the 'good faith' proviso as applied to a situation involving only phantom freight [outlawed by the *Staley* case; see note 50 *infra*] and one involving only freight absorption." *FTC v. Cement Institute*, 333 U. S. 683, 725 (1948).

49. When this case came before the Circuit Court of Appeals for the Seventh Judicial Circuit, two of the judges remarked that the legislative history of the statute portrayed so clearly the intent of Congress not to accept such an interpretation that the Court could not construe that statute as the Federal Trade Commission requested without showing a complete disregard of that legislative history:

"We know of no criticism so often and so forcibly directed at courts, particularly Federal Courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the Courts, it will mark the high tide in judicial usurpation." *Cement Institute v. FTC*, 157 F. 2d 533, 573 (7th Cir. 1946).

Shortly thereafter that case reached the Supreme Court, which without hesitation proceeded to give the statute the very interpretation which the lower court had so frankly characterized in advance. This was despite the vigorous dissent of Mr. Justice Burton, who quoted the lower court's language. Thus subdued, the same Circuit Court of Appeals when confronted with a similar problem, followed without protest the edict of the higher tribunal. *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d 175 (7th Cir. 1948).

Act to outlaw, by words not necessary to its decision, the basing point pricing system. It achieved this result by the very simple expedient of saying that such systems had really been forbidden in the earlier *Glucose* cases.⁵⁰ Despite the fact that this interpretation would have astonished Chief Justice Stone, writer of those two opinions,⁵¹ it is impossible to doubt the force as a judicial precedent of this subsequent "restatement" in which all but one judge concurred.⁵² It is significant that immediately following the decision of the Court in the *Cement* case the Federal Trade Commission announced in a formal release that it construed the decision as prohibiting not only basing point systems but other delivered price systems as well.⁵³

50. *Corn Products Co. v. FTC*, 324 U. S. 726 (1945); *FTC v. Staley Mfg. Co.*, 324 U. S. 746 (1945). That this interpretation by Mr. Justice Black was "more sweeping than necessary to restate the holdings" in those cases, see Zlinkoff and Barnard, *supra* note 46, at 1002.

51. The Chief Justice there referred to the Commission's attempt to obtain "such a drastic change in existing price systems," and concluded that "Congress was unwilling to require f. o. b. factory pricing and thus to make . . . all basing point systems illegal *per se*." 324 U. S. 726, 736-7 (1945).

52. This device of making the critical determination obliquely by saying that the issue had been already decided in an earlier case [*cf.* the discussion of conspiracy in the *Gypsum* case and the discussion of the "possibility" of competitive injury in the *Morton Salt* case, *infra*] is a very simple expedient for the opinion writer since he need display no logic or reasoning to support his conclusion. It is of course, completely unsatisfactory to the lower courts and to the bar since it gives no opportunity for argument on the merits, and it thoroughly confuses those who must thereafter construe and apply the earlier "re-decided" decisions.

Compare, e. g., the Commission's request that businesses voluntarily comply with the *Cement* decision by eliminating delivered prices, *with* the criticism of the cement and steel companies for doing so, since the decision did not really compel it. Zlinkoff and Barnard, *supra* note 46, at 1016. This criticism of the discontinuance of basing point selling by the steel companies is difficult to reconcile with the suggestion by the same authors in a companion article that the Government might have proved an illegal intent on the part of U. S. Steel in the *Columbia Steel* case by "showing the uniform pricing system that prevails in the steel industry under the leadership of U. S. Steel . . ." Zlinkoff and Barnard, *Mergers and the Antitrust Laws: The Columbia Steel Case, The Supreme Court and a Competitive Economy*, 1947 Term, 97 U. OF PA. L. REV. 151, 163 (1948).

53. Since that time there has been an unprecedented controversy among members of the Commission and among their attorneys and members of their staff as to the meaning of the decision. Some state that f. o. b. prices are not required by the decision and that uniform delivered prices are proper unless a number of competitors sell on a similar basis. See Edwards, *A Summary of the Basing Point Controversy*, a statement delivered at the meeting of the Institute of Trade and Commerce Professions, New York, November 23, 1948.

See also the testimony of Walter Wooden before the Subcommittee of the Senate Interstate Commerce Committee, *supra* note 44 (1948).

In the "Statement of Federal Trade Commission Policy Toward Geographic Pricing Practices" issued by the Commission on October 12, 1948, the Commission, in explaining its views in the *Rigid Steel Conduit* case states that it could have described the state of facts involved in Count II as a price conspiracy because a number of enterprises followed "a parallel course of action." It then states: ". . . the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion, and, for this reason, the Commission treated the conscious parallelism of action as violation of the Federal Trade Commission Act." (page 3). On pages 4 and 5 of the same statement the Commission concludes that "the following types of cases may be regarded as open to

The widespread sweeping effect of this new "judicial law" is almost beyond measure. Commissioner Mason has stated that freight absorption, zone prices and individual delivered prices are illegal. The New York Times, in commenting on this interpretation of the Supreme Court opinion said:

"If Mr. Mason's ideas should prove to be accurate, it can be expected that the marketing procedures of all domestic heavy industry are due for revolutionary changes. Virtually all industrial sales will be on an f. o. b. mill basis.

"Industries which are due to be affected by the outlawing of basing point systems are the following: iron and steel, lime, rubber, glass containers, farm equipment, paint and varnish, business furniture, auto parts, paper and pulp, wholesale food and grocery products, construction machinery and wholesale coal."⁵⁴

Commissioner Mason points out that if he is correct in his interpretation to the effect that all delivered price systems of selling are outlawed, the impact will be universal throughout our economy. From five-cent Coca-Cola, five-cent gum, and fifteen-cent magazines to two-thousand-dollar machines, nationwide uniform prices on all com-

question . . . : . . . (b) systems of freight equalization used by competitors in such a way as to produce similar typical identities." But see Zlinkoff and Barnard, *supra* note 46, at 1012: "It is an economic truism that a seller will have to continue to meet a competitor's price so long as he wants to sell in a particular market where his competitor has a freight advantage."

In two pending cases, National Lead Company, Civil No. 5253, Nov. 25, 1944 and Chain Institute, Civil No. 4878, Dec. 22, 1942; amended complaint, Oct. 9, 1945, the Commission has complained that the maintenance of uniform delivered prices which result in varying mill net realization is in itself a violation of the Clayton Act.

Others contend that the effects of the decision are to outlaw individual price "discrimination." See testimony of Professor Frank Fetter, *Hearings of the Monopoly Subcommittee of the House Small Business Committee*, 80th Cong., 2d Sess. 163 (1948). Allen C. Phelps, Chief of the Commission's Division of Export Trade, testified on November 10, 1948, before the Senate Subcommittee that the effect of the recent decision has been to make administrative and judicial changes in the antitrust laws which "are inconsistent with either the implied intent of Congress or with its express intent. (P. 86.)

"Certainly no one could characterize the present confused situation as desirable from a legal or administrative standpoint or one which could not justify study and serious consideration of remedial measures. . . . (P. 93.)

". . . To all practical purposes it is now presumptively unlawful for any supplier to sell his product at uniform delivered prices which do not take into account differences in transportation costs." (P. 86.)

Edwin George, economist for Dun and Bradstreet, recently stated that there is at least a tremendous amount of dispute as to whether there is confusion. When subpoenaed to testify before Congress, several commissioners stated that they do not interpret the decision as outlawing all delivered price systems. But see the statement of Commissioner Lowell Mason: "I believe that freight absorption is out. I believe zone prices are out. I believe that an individual delivered price system is out." N. Y. Times, May 23, 1948, § 3, p. 1, col. 5; *Senate Hearings, supra* note 44, at 170 *et seq.*

54. Mullaney, *Basing Point Seen Out in Price Fixing*, N. Y. Times, May 23, 1948, § F, p. 1, col. 5.

modities will be outlawed. This would affect the marketing practices of over 82,000 manufacturers and 37,000 wholesalers.⁵⁵

The ultimate economic effects of such a change in the law are the subject of a lively current debate. Those who advocate the elimination of delivered price systems of selling urge that the present use of these systems results in the following disadvantages:

1. Higher prices because of lack of competition;
2. Price discrimination;
3. Unnecessary cross-hauling;
4. Excess productive capacity;
5. "Sticky" prices, because collusion is easier;
6. The uneconomic location of plants because of the lack of competition which tends to hold an umbrella over the inefficient producers.⁵⁶

The opponents of the change contend, on the other hand, that to require f. o. b. selling would be to make nationwide selling impossible, eliminate mass production, and hence cause higher prices. In place of our present system of national selling a Balkanized economy would result wherein each factory would have its own impregnable monopoly, protected by judicial edict, in its own freight advantage territory. The effect would be to decrease competition and to devastate whole economic regions. "The Commission's systematic and inexorable demolition of communities whose principal industries labor under a freight disadvantage in important markets would decimate whole regions. It does not require statistical analysis to show how this would affect the railroads."⁵⁷

Whichever school of economists proves ultimately to be correct, there can be no question but that these changes are extreme. Walter Wooden, Associate General Counsel of the Federal Trade Commission, in speaking of the effect of the *Cement* decision on the domestic economy said recently: "He would be a bold man . . . who would undertake to forecast in detail the nature and extent of the changes in the pricing structure and marketing methods that will flow from the Supreme Court's decision."⁵⁸

55. *Senate Interstate Commerce Committee Hearings*, *supra* note 44, at 177, 178.

56. See Zlinkoff and Barnard, *Basing Points and Quantity Discounts*, *supra* note 46, at 989-90; Adelman, *supra* note 4, at 1329-30, 1332-4, 1337-47.

57. Leighton, *Seeks to Wipe Out Long-Haul Traffic*, 123 RAILWAY AGE 1106 (1947). And see Zlinkoff and Barnard, *supra* note 46, at 1012-13, to the effect that if f. o. b. pricing is required local monopolies will result.

58. Speech at Harvard Graduate School of Business Administration, November 16, 1948.

Regardless of the ultimate merits of the controversy it seems abundantly clear that such revolutionary changes in our national economy should be made, when they are made, by Congress, and not by the Courts. Inasmuch as Congress has deliberately—and expressly⁵⁹—rejected legislation designed to do what the Commission sought, it would seem fitting for the Courts to refuse to rewrite the law to accomplish that very objective.⁶⁰

D. "Possibility of Competitive Injury"

An impressive instance of the Court's disregard of its own judicial precedents⁶¹ is to be found in the construction of the Clayton and Robinson-Patman Acts, which prohibit price discriminations and certain other specified activities where the effect "*may be* substantially to lessen competition." This standard, of course, calls necessarily for judicial interpretation. During the thirty years that this language has been in effect, the Court has with marked uniformity required the proof of reasonable probability of competitive injury in order to establish violation of the Act.⁶² One of the most recent re-expressions of this rule was in the *Corn Products* case where Chief Justice Stone said:

"But as was held in the *Standard Fashion* case, *supra*, with respect to like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition."⁶³

However, in the latest Robinson-Patman Act decision,⁶⁴ the Supreme Court threw over this long-standing statutory construction by the simple device of saying that it had previously ruled—in the

59. See the language of Chief Justice Stone, *Corn Products Co. v. FTC*, 324 U. S. 726, 737 (1945); *Cement* case in the circuit court of appeals, *supra* note 49.

60. See S. 241, 80th Cong., 2d Sess. (Capehart resolution) (1948). "Resolved, that the Senate Committee on Interstate and Foreign Commerce . . . is authorized and directed to conduct a full and complete inquiry into the impact upon the consumers of goods and upon small and large business in the United States of the decision of the United States Supreme Court . . . in the case of the Federal Trade Commission, Petitioner, versus the Cement Institute. . . ." Pursuant to that resolution a subcommittee under Senators Capehart (80th Cong.) and Johnson (81st Cong.) is holding extensive hearings as to the desirability of a clarification.

61. To which was added the weight of subsequent Congressional use of the same language in the amending Robinson-Patman Act.

62. See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356 (1922); *International Shoe Co. v. FTC*, 280 U. S. 291, 298 (1930); *Corn Products Co. v. FTC*, 324 U. S. 726, 738 (1945).

63. 324 U. S. 726, 738 (1945).

64. *FTC v. Morton Salt Co.*, 334 U. S. 37 (1948).

same *Corn Products* case—that all that was required was “a mere possibility of competitive injury.” A careful analysis of Mr. Justice Stone’s opinion in that earlier case indicates very clearly that he did not intend to depart from the traditional interpretive rule.⁶⁵ But as a practical matter the majority of the Court has now subscribed to Mr. Justice Black’s interpretation of the earlier opinion, and the Federal Trade Commission has already served notice that it intends in some areas to follow the new construction of the statute. Inasmuch as similar language constitutes the test for violation of several anti-trust measures⁶⁶ it would seem likely that this new relaxed test will become the criterion for all such statutory provisions.

It is impressive that the FTC has referred to this as a “radical interpretation of the law,” and has since announced that it will not use this new found standard of proof in connection with the “geographical” price cases, but will there continue to look for *substantial probability* of competitive injury.⁶⁷ There is, of course, no assurance that treble damage complainants will be equally magnanimous. Certainly the Commission’s attitude will not change the law.⁶⁸

CONSPIRACY

Ever since the rule of reason was adopted as an integral part of the Sherman Act in 1911, judicial interpretations of Section 1 of that Act—which outlaws agreement or conspiracy in restraint of trade—have indicated fairly clearly the type of activity which will be held to constitute such an agreement or conspiracy. It is clear, for example, that there need be no formal contract or explicit understanding between the parties.

65. See Mr. Justice Jackson, dissenting in *FTC v. Morton Salt*, *supra* note 64, at 57-8.

66. Clayton Act, §§ 3, 7, 38 STAT. 731 (1914), 15 U. S. C. §§ 14, 18 (1946); Robinson-Patman Act, § 2(a), 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1946).

67. *Statement of Federal Trade Commission Policy Toward Geographic Pricing Practices*, *supra* note 53, at 7 and 8: “However, there are strong reasons why the concept of injury adopted by the Court in the *Morton Salt* case should not be applied automatically to discriminations arising under geographic pricing systems. . . . In geographical price discriminations . . . the minimum determination of injury should be based upon ascertained facts that afford *substantial probability* that the discriminations if continued, will result in injury to competition.” But see Zlinkoff and Barnard, *supra* note 46, at 1010 n. 98, criticizing the attempt to draw such a distinction between two types of cases under the same statutory provision.

68. That the unquestioning support given the Commission’s conclusion by the Court amounts to placing the burden of proof of innocence on the defendant, see testimony of Lowell B. Mason, *Subcommittee of Senate Interstate Commerce Committee* 179-180, *supra* note 44. And see Mr. Justice Jackson, dissenting in the *Morton Salt* case, referring to “the almost absolute subservience of judicial judgment to administrative experience [which] means that judicial review is a word of promise to the ear to be broken to the hope.” *FTC v. Morton Salt*, 334 U. S. 37, 58 (1948).

Illustrative of the type of conduct which was held to sustain a finding of conspiracy were the famous Gary dinners where representatives of the Steel Corporation simply announced to the other people present what Steel's prices were to be during the succeeding period. It was acknowledged that the representatives of the other companies present understood from the announcement that those were to be the prices which they would all follow. On the other hand, it has been consistently clear that mere price leadership pursuant to some historic pattern in an industry—where one company leads the way on price changes and where other companies for competitive reasons, independently follow those price changes—was perfectly legal. Thus, similarity of action of competitors has never, standing alone, been sufficient to sustain a charge of conspiracy.

Within the past decade, however, the Court has moved more and more in the direction of holding conspiratorial any common action engaged in by competitors in the same field.⁶⁹ In the recent *Gypsum* case this was carried to an extreme when the Supreme Court held that the mere fact that several companies accepted similar license agreements from a patentee, knowing that other companies had accepted licenses containing price control provisions under the same patents, was, where those price control provisions were enforced, prima facie evidence of conspiracy.^{69a} Certainly if applied to antitrust cases generally this rule of "parallel action" would make the finding of conspiracy a matter of rote.⁷⁰

Where the Federal Trade Commission states that it has found a conspiracy, the Supreme Court apparently intends to sustain that conclusion regardless of the presence or absence of any convincing evidence on the subject.⁷¹ A most striking example of this is to be found in the facts of the recent *Cement* case where several West Coast companies pointed out that although the conspiracy charged was with regard to the use of a multiple basing point system to obtain price identity, they did not even sell on a basing point system, but rather on a zone price system. These companies did not use the freight rate

69. *Interstate Circuit v. United States*, 306 U. S. 208 (1939); *United States v. Masonite Corp.*, 316 U. S. 265 (1942); see also *Fort Howard Paper Co. v. FTC*, 156 F. 2d 899 (7th Cir. 1946). And see Adelman, *supra* note 4, at 1343: "In actions alleging a price-fixing combination, there has clearly been a shift of attention from literal collusion to what might be called the collusive effect of independent actions taken in mutual awareness."

69a. The net effect of this holding obviously may well be to outlaw for all practical purposes the very price fixing which the *General Electric* case purports to permit.

70. That this is already the practical effect of the new *Tobacco* case, see Rostow, *The New Sherman Act*, 14 U. OF CHI. L. REV. 567, 577 (1947). But see Zlinkoff and Barnard, *supra* note 46, at 1012: "It is an economic truism that a seller will have to continue to meet a competitor's price so long as he wants to sell in a particular market. . . ."

71. Cf. the Administrative Procedure Act, *supra* p. 321.

books issued by the Institute, of which the Commission had complained, and there was in total a virtually complete absence of any positive evidence implicating them in any way with the activities of the other companies. The only connection established lay in the fact that they had at one time been members of the Cement Institute when it was a Code Authority set up pursuant to the NRA. Yet, all that the Supreme Court was willing to concede in regard to their contention was that this want of evidence bore out the Commission's finding that some of the companies were more "active and influential in the combination than were others."⁷² As one member of the Commission has recently pointed out, this present trend "will make life so uncomfortable for members of [trade] associations that the hazard of membership will hardly be worth the legitimate advantages."⁷³ For certainly mere membership in an association may now be sufficient to tar the reputations of the most innocent companies with the misdeeds and indiscretions of the most guilty industry members. This would follow regardless of complicity of the association officials in any misdoings. Indeed, the members of the Commission appear to take the position that mere identity of action—such as charging the same price—is sufficient to sustain its conclusion that there has been an illegal conspiracy.⁷⁴

Certainly the trend of these decisions is to eliminate the fundamental distinction between innocence and guilt which has so long been an integral part of the statute's interpretation.

72. See *FTC v. Cement Institute*, 333 U. S. 683, 718 (1948).

73. Mason, Address before the Marketing Club of Harvard Graduate School of Business Administration, May 14, 1948.

74. *Statement of Federal Trade Commission Policy Toward Geographic Pricing Practices*, *supra* note 53, at 3: "The Commission chose to rely on the obvious fact that the economic effect of identical prices, achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion, and, for this reason, the Commission treated the conscious parallelism of action as violation of the Federal Trade Commission Act." See *Fort Howard Paper Co. v. FTC*, 156 F. 2d 899 (7th Cir. 1946). The Supreme Court appears to have subscribed to the same doctrine. *FTC v. Cement Institute*, 333 U. S. 683, 725 (1948): "Each of the respondents . . . sold some cement at prices determined by the basing point formula, and governed by other base mills. Thus, all respondents to this extent adopted a discriminatory pricing system condemned by Sec. 2. As this in itself was evidence of the employment of the multiple basing point system by the respondents as a practice, rather than to meet 'individual competitive situations,' we think the FTC correctly concluded that the use of this cement basing point system violated the act." (Emphasis added.)

Allen C. Phelps, Chief of FTC's division of export trade, testified recently that if present trends continue, the time may come when businessmen will be prosecuted "for their failure to compete or to conduct price wars with one another; for their individual action in following the price leadership of a competitor . . ." *Hearings before Subcommittee of Senate Interstate Commerce Committee*, 80th Cong., 2d Sess. 92 (1948). And see the ruling of the Trial Examiner in the *American Iron and Steel Institute* case: "The trial Examiner construes the *Cement Institute* decision and *Rigid Steel Conduit Association, et al. v. Federal Trade Commission*, 168 F. 2d 175, to hold that such conscious coincident adherence to this system of pricing and sale is, *per se*, some evidence of agreement, combination and conspiracy." Docket No. 5508, B. N. A. Daily Executive Reports, No. 250, Dec. 23, 1948, p. A-3.

MONOPOLIZATION AND THE "NEW SHERMAN ACT"

Section 2 of the Sherman Act prohibits monopolies and makes it illegal to "monopolize" commerce. The Act in its inception was aimed at bad big business; it was the ruthless power of the combines and trusts—used to stifle initiative and competition—which led to the popular demand for antitrust legislation at the end of the last century. The subsequent history of Section 2 has, until recently, been consistent with this underlying purpose of the Act. It was enunciated clearly that mere bigness in and of itself was not illegal—large size being in many instances a natural concomitant of our mass production economy.⁷⁵

The standard of guilt or innocence was monopolization of an industry—so that competition was prevented or impaired—and the attendant evils of high price and poor quality were threatened.

But within the past few years the Antitrust Division and the Supreme Court have with "revolutionary speed"⁷⁶ taken large strides in the direction of rewriting Section 2 to accord with the notions of certain economists. These men have warned against the dangers and evils of bigness *per se*, regardless of any monopoly proportions and regardless of the size or virility of competitors.⁷⁷ They also contend that a situation wherein three or four companies do most of the business in an industry is equivalent to a monopoly in its effect on competition, and that accordingly mere "size and fewness" is enough to justify a finding of guilt.⁷⁸ There is also evident a marked tendency

75. *United States v. U. S. Steel Corp.*, 251 U. S. 417 (1920).

76. Rostow, *The New Sherman Act*, *supra* note 70, at 574.

77. *U. S. v. Aluminum Co.*, 148 F. 2d 416 (2d Cir. 1945). Cf. the language of the four dissenting justices in *U. S. v. Columbia Steel Co.*, 334 U. S. 495, 534 (1948); "Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men." *Id.* at 535: "*The Curse of Bigness* shows how size can become a menace—both industrial and social." See also Rostow, *The New Sherman Act*, 14 U. OF CHI. L. REV. 567, 577 (1947): "In the *Aluminum* case Judge Hand finally interred and reversed the old dictum that size is not an offense under the Sherman Act. Size . . . was the essence of the offense."

Corwin Edwards, Chief Economist of the Federal Trade Commission, has recently said that we should start with the presumption that "bigness is objectionable and should destroy the giant enterprise unless that presumption is successfully defended." N. Y. Journal of Commerce, Nov. 9, 1948, pp. 1, 9.

78. Rostow, *The New Sherman Act*, *supra* note 70, at 575: "Monopolistic markets are those of a single seller, or of a few sellers . . ."; at 576: "The Supreme Court is on the threshold of recognizing what the economists call monopolistic competition as the offense of monopoly under Section 2 of the Sherman Act. . . . The definition would include the parallel situations where a small number of concerns have determining influence by reason of their position as buyers." And see COUNSEL OF ECONOMIC ADVISERS, THIRD ANNUAL REPORT TO THE PRESIDENT 17 (1948).

Cf. the O'Mahoney Bill, S. 2908, 80th Cong., Spec. Sess. (1948), providing that in an industry where five or less companies produce 30 percent or more of the national output, prices could not be increased without a public hearing before the FTC, the Attorney General, and the Secretary of Commerce. Note that such a requirement would govern well over the three-quarters of American industry, *infra* p. 339.

to make of Section 2 a very sweeping catch-all in which relatively small defendants can be held guilty in the absence of any conspiracy, intent, design, or attempt to violate the law.⁷⁹ In the recent *American Tobacco Co.* case,⁸⁰ involving the three large tobacco companies, the Supreme Court held that the mere existence of power in the three companies, coupled with the fact that they had been found by a jury to have conspired to violate the law to restrain interstate commerce, was sufficient to prove the crime of monopolization, whether or not that power was ever actually exercised.⁸¹ Equally important is the language of Mr. Justice Jackson in *International Salt Co. v. United States*⁸² to the effect that it is "unreasonable, *per se*, to foreclose competitors from any substantial market". It should be noted that this latter case was based purely on a conspiracy charge and did not involve any element of monopolization. Yet in *United States v. Griffith*,⁸³ the Supreme Court recently combined that sentence with the *Tobacco* holding and relied on them as a basis for ruling that the mere exercise of superior buying power by a large competitor (which was the dominant company in its field in a three-state area) was an illegal monopolization, where the exercise of the buying power resulted in the obtaining of a competitive advantage over smaller competitors. The previously necessary element of "intent" to monopolize was supplied by substituting the "effect", and the presumption that one "intends" to do what he "does." This ruling came in a case where the Government had failed to win in the lower court because it was unable to prove any conspiracy, any agreement in restraint of trade, or any attempt to injure or eliminate competition. In the *Columbia Steel* case⁸⁴ the Court reaffirmed the proposition that it is no longer necessary, in establishing an "attempt to monopolize", to prove unreasonable, illegal, or unfair competitive activities. The effect of these holdings may well be to make of Section 2 a well-nigh fool proof catch-all provision. Indeed, if literally applied they would make it virtually impossible for any accused to defend himself successfully.

79. See Burns, *If You're in Business You're Probably Guilty*, 28 BARRON'S WEEKLY 5 (1948): "While [monopoly] may at one time have meant a single company in control of an industry, or a small group bound together in a trust by specific agreement, so that they acted as one, at present the smallest company may find itself accused of conspiring to monopolize."

80. *American Tobacco Co. v. U. S.*, 328 U. S. 781 (1946); see Murchison, *Significance of The American Tobacco Co. Case*, 26 N. C. L. Rev. 139 (1948).

81. Rostow, *The New Sherman Act*, *supra* note 70, at 585: "When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown."

82. 332 U. S. 392, 396 (1947).

83. 334 U. S. 100 (1948).

84. *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948).

There is thus evidence that the Court is approaching a single standard in determining whether there has been an illegal restraint of trade or an illegal monopolization. Whether the complaint is couched in language of a restrictive agreement between several defendants,^{84a} or in an allegation of monopolization, a conviction might be obtained simply by proving the market effect, without evidence of collusive acts, illegal intent, or predatory practices. The Court appears thus to be shifting to a standard of market control, the limits of which are totally without definition, although at the same time utilizing in some cases the older criteria of predatory tactics and collusive agreements. The result has been, understandably enough, to produce "some novel stresses and strains."^{84b}

In the *Paramount* case,⁸⁵ the Court ordered the District Court, in exploring the question of monopolization of motion picture exhibitors throughout the United States, to consider not only the national scene but also to determine whether there was a monopoly in the field of first-run houses nationally; to determine whether there was a monopoly of first-run theaters in the 100 principal cities of the United States; and to determine whether there was a monopolization of the first-run theaters in any one city in the United States. This instruction would appear to indicate that the Court will now sustain a Government charge of monopoly even in the smallest segment of the nation's geography, thereby increasing enormously the area of Sherman Act activity.⁸⁶ Similarly, the Supreme Court has recently held⁸⁷ that purely intrastate activity may be found to be violative of the Sherman Act where the products involved may ultimately move in interstate commerce.⁸⁸

84a. Perhaps between a single corporation and its affiliates. *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947); *General Motors Corp. v. United States*, 121 F. 2d 376 (7th Cir. 1941), *cert. denied*, 314 U. S. 618 (1941). And see *Adelman*, *supra* note 4, at 1313-17.

84b. *Adelman*, *supra* note 4, at 1305, 1322.

85. *United States v. Paramount*, 334 U. S. 131 (1948).

86. *Cf. United States v. Columbia Steel Co.*, 334 U. S. 495 (1948); *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947).

87. *Mandeville Island Farms v. American Crystal Sugar*, 334 U. S. 219 (1948).

88. A very significant corollary problem is in the area of integration—which connotes the combining into one organization of several stages of the production, processing, or marketing of a given type of product. Integration has historically proven to be one of the most important factors in the growth of large-scale economies in our industrial system. Certainly it would be the most severe shock to our modern economy if businessmen were to be told suddenly that all integrated enterprises must be broken up into independent units. Yet it would appear from Mr. Justice Douglas' language in *United States v. Paramount* that this almost happened. This language was: "A majority of this court does not believe that integration in and of itself is violative of the Sherman Act." 334 U. S. 131, 173 (1948). All that this leaves in doubt is the number of those on the bench who do feel that integrated companies are, because of the fact that they are integrated, illegal organizations.

In the words of one writer: "So drastic have been these decisions . . . that the Department of Justice could now almost at will drive a forensic tank right through the conventional defenses of big-business lawyers in a Sherman Act prosecution, without having to prove their firms guilty of a single sin, transgression, high-handed action, frailty, error, or weakness. The DJ's argument need be worded only in economics; the corporation need only be strong and it is in the wrong."⁸⁹

RETROACTIVITY: A CRIMINAL ASPECT

The element of the retroactive application of the Supreme Court decisions is a most significant one. It is, to be sure, the traditional concept of the interpretation of any statute to assume that the statute has meant at all times since its enactment exactly what the Court rules today or tomorrow is the proper statutory interpretation. But it is this factor which so seriously disturbs the confidence of the businessman in the motives and judgment of the court when it suddenly disregards long-standing and widely accepted interpretations of the statute.⁹⁰ When a judicial interpretation of fifty or sixty years standing is overnight thrown into the discard, it means necessarily that all those who have relied on the accepted interpretation are law violators and subject to suit, conviction, and treble damage actions because of their conduct covering a period of three years in the past. This is particularly serious in view of the Court's present policy of allowing evidence of no matter how great antiquity to be introduced for the purpose of establishing the "pattern" or the "state of mind" which will be projected on down into the three-year period within the Statute of Limitations.⁹¹ There are instances in recent decisions of Court reliance on documents written 25, 30, 40, and even 70 years prior to

Presumably there are four such justices. Cf. the dissent in *United States v. Columbia Steel Co.*: "We need not hold that vertical integration is *per se* unlawful in order to strike down what is accomplished here." 334 U. S. 495, 539 (1938). However, this objective has been definitely blocked by five of the justices, at least for the present: "It seems clear to us that vertical integration, as such without more, cannot be held to be violative of the Sherman Act." *United States v. Columbia Steel Co.*, *supra*, at 525. For a criticism of this case, see Zlinkoff and Barnard, *supra* note 52. For a brilliant discussion of the problem of integration, see Adelman, *supra* note 4, at 1312-22.

89. Fleming, *Bigness Fast Becomes Top Economic Crime*, Christian Science Monitor, May 28, 1948.

90. See Burns, *supra* note 79, at 6: "It is a serious question for business to what extent the Supreme Court should have the authority to make retroactive decisions, which not only change accepted business practices, but render almost every businessman subject to criminal penalty . . . with the Supreme Court making the change, it dates back to the time the antitrust laws were passed, and makes criminal what even the justices themselves concede had not been considered criminal prior to the decision."

91. Civil suits for private damages are governed by the respective state statutes of limitations, not the Federal statute. *Atlanta v. Chattanooga Foundry*, 203 U. S. 390 (1906).

the time of the filing of the suit. A resolution of the Board of Directors of the Pullman Company, which was adopted in 1870—20 years prior to the enactment of the Sherman Act—was relied on by the court in the *Pullman* case in finding, 73 years later, the intent to monopolize.⁹²

These problems are particularly serious when the charge in the case involves criminal responsibility. In one recent litigation the Government brought an indictment against several companies charging illegal price fixing in the manufacture and sale of a patented commodity.⁹³ In one aspect of the case the innocence or guilt of the defendants turned on the applicability and validity of the rule of the *General Electric* case. The questioned license contract was entered into in 1928, and was drafted in reliance on the Supreme Court decision 2 years earlier. At the time of the indictment in 1941 the *General Electric* doctrine had been repeatedly sustained by all courts. At the time of the trial of the criminal case, in 1947, the *General Electric* doctrine, though frequently criticized, had been consistently applied by lower courts and had never been shaken in any Supreme Court decision. It was only subsequent to the trial, while the parties were awaiting the judge's decision, that the *Line Material*, *Gypsum*, and *Paramount* cases—all severely confining the area of *General Electric* application—were decided. The Court's decision turned in large part on the application of these cases (decided after over 45 years of the traditional interpretation), and expressly rejected the defense argument that such re-interpretation was analogous to an *ex post facto* law, on the ground that the constitutional prohibition applies only to statutes.⁹⁴

Jeremy Bentham, in a famous criticism, wrote in 1792:

"When your dog does anything you want to break him of, you wait until he does it and then you beat him for it. This is the way you make laws for your dog; and this is the way the judges make laws for you and me. They won't tell a man beforehand what it is that he *should not* do—they won't so much as allow of him being told; they lie by until he has done something which they say he *should not have done* and then they hang him for it." ⁹⁵

Mr. Justice Cardozo once suggested that an expedient might be for courts in announcing that they no longer subscribe to earlier

92. *United States v. Pullman Co.*, 50 F. Supp. 123 (E. D. Pa. 1943).

93. *United States v. Carbology*, 80 F. Supp. 989 (S. D. N. Y. 1948). The indictment was returned in 1941. The trial ran from Jan. 21 to March 27, 1947. Decision against the defendants was entered October, 1948.

94. *United States v. Carbology*, *supra* note 93. But see Jackson, *Decisional Law and Stare Decisis*, *supra* note 8.

95. Quoted in Kocourek, *Retrospective Decisions*, 17 A. B. A. J. 180 (1931).

judicial precedents to apply the old interpretation to the facts in the case being adjudicated, but to announce that henceforth a new interpretation will apply.⁹⁶ This practice would be helpful insofar as the individual litigant involved in the pending case is concerned. It would not protect those who have acquired a potential liability by acting in reliance on the old rule in such a way that they will be subject to damages for that past conduct.

REMEDIES

That the punishment should fit the crime is both a time and a lyrically honored legal maxim. The Supreme Court has recently given very careful attention to the matter of the relief to be decreed in anti-trust cases. It has evidenced this interest by a curious mixture of careful review of and participation in lower court decrees where they do not satisfy it, and by complete self-abnegation and an attitude of withdrawal where the lower court has entered a decree with which it sympathizes. In the *International Salt* case the Government charged that the defendant had, in leasing its salt dispensing machines, required that the lessees obtain the salt tablets from the lessor; as a remedy the District Court not only ordered the illegal contracts cancelled, but also ordered the salt company to *sell* its *machines* on uniform terms to any and all applicants. This order the Supreme Court affirmed on the ground that it is up to the trial court to impose the remedy to correct the wrongs alleged.⁹⁷ In two of the *Motion Picture* cases, despite painstaking and arduously worked out district court decrees, the Supreme Court set aside the lower court orders, with virtual instructions to order divestiture of the defendant exhibitors, which the lower courts had refused, regardless of the fact no "national monopoly" had been found, and regardless of the fact that both courts were in agreement on the issue of the defendant's culpability.⁹⁸ In the recent Federal Trade Commission cases the Court has given the impression that it will uphold any order entered by the Commission which the Commission feels is necessary to remedy the situation found.⁹⁹

The most serious aspect of the whole problem of the proper remedy lies in the field of dissolution. The Department of Justice has

96. HALL, SELECTED WRITINGS OF CARDOZO 35-37 (1947).

97. "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co. v. United States*, 332 U. S. 392, 400-401 (1947).

98. Compare also the complete revision of the lower court decree in *Hartford-Empire Co. v. United States*, 323 U. S. 386 (1945), with the complete affirmance of the decree in *United States v. National Lead Co.*, 332 U. S. 319 (1947).

99. *FTC v. Cement Institute*, 333 U. S. 683 (1948); *FTC v. Morton Salt Co.*, 334 U. S. 37 (1948).

been pressing persistently in the recent cases to obtain divestiture of the defendants' business; this attempt has been made consistently whether or not the size of the units sought to be broken off or fractionalized relates in any way to the illegality complained of. Thus, in the *National Lead* case the Department sought in the first instance to have National Lead and Du Pont compelled to go completely out of the titanium business, although the issues in the case did not turn at all on monopolization but rather on an illegal conspiracy in connection with a world-wide cartel. When the Justice Department was unsuccessful in this regard, it then sought to have the business of each of the companies in titanium pigments broken into small units so that there would be a large number of competitors instead of the current four. The Court refused this relief on the ground that it was in no way shown to relate to the illegal conduct of the defendants. However, in the subsequent *Paramount* and *Schine* cases the Court, speaking through a different justice, went to very much the opposite extreme of compelling the lower courts to re-examine the question of divestiture (which the lower court had refused to order). The Supreme Court went out of its way to say that disintegration of companies found to have violated the law should not be confined simply to cases of monopolization but might also be ordered where an illegal conspiracy has existed. The Court stated that that relief sometimes was necessary in order to remove from the defendants any advantage which their illegal conduct may have given them.¹⁰⁰

It is the announced intention of many of those in the Antitrust Division to obtain to the greatest extent possible the breaking up of large industrial enterprises. In view of the recent decisional encouragement, it is logical to assume that in an increasing percentage of the antitrust suits pending and to be brought in the future, the Antitrust Division will seek to have divestiture ordered regardless of the facts involved in the particular case.¹⁰¹

Needless to say, the economic implications of such a program are enormous. Whatever one may think as to the merits of large com-

100. *Schine Chain Theaters v. United States*, 334 U. S. 110 (1948). Yet the historic rule had been that an equity decree should do no more than enjoin the illegal activities of the sort complained of; it should not be punitive. See *Local 167 v. United States*, 291 U. S. 293, 299 (1934).

101. See Complaint, *United States v. Armour Co.*, N. D. Ill., Sept. 5, 1948, asking that four large packing companies be broken into fourteen companies.

In addition to the *National Lead* and *Motion Picture* cases, see *United States v. Libbey-Owens Ford Co.*, Civil No. 5239, N. D. Ohio (the *Flat Glass* case), *consent decree entered*, Oct. 30, 1948; *United States v. General Electric Co.*, Civil No. 1364, D. C. N. J. (the *Incandescent Lamp* case), *still pending*. See also the Petition of *United States for Divestiture*, filed in *United States v. Aluminum Co.*, Eq. No. 85-73, S. D. N. Y. 1948. Compare the complaint in *United States v. New York Trap Rock Corporation*, S. D. N. Y., 1948; *United States v. Western Electric Co.*, D. C. N. J., Jan. 14, 1949. Cf. the recommendations of Corwin Edwards, *supra* note 77.

panies in any industry, the problem certainly cannot be solved intelligently by a random series of antitrust prosecutions and indiscriminate disintegration.

If, for example, we accept the thesis of some economists that the Sherman Act should be interpreted as outlawing the large units in any line of commerce when a few of them predominate in that industry,¹⁰² some examination is indicated to disclose the number and nature of the industries—and the portion of the entire economy—so constituted. Willard Thorp, in a TNEC Monograph¹⁰³ reported a cross-section sample of the manufacturing industry which “presents a comprehensive over-all picture of the situation existing in the entire manufacturing segment of the economy.” The author computed as to each manufactured product a “concentration ratio”, showing the proportion of the total quantity output of that product accounted for by the four largest producers in that field. His findings were that “approximately three-fourths of the total number of products had concentration ratios above fifty per cent, about one-half of all the products analyzed had concentration ratios above seventy-five per cent and nearly one-third had concentration ratios above eighty-five per cent.”

The interpretation advocated by this school of economists would thus entail—depending on the percentage which the Court concluded constituted “predominance”—the wrecking and rebuilding of the economic pattern in from one-third to three-fourths of our entire industrial economy.

The members of the Supreme Court are not selected on the basis of economic proficiency. It is unreasonable to expect a handful of men with no prerequisite of training in that highly complex field to pass intelligently on the purely economic issues with which they are being increasingly confronted.¹⁰⁴

The resolution of legal issues—the interpretation and application of the law—must remain the function of the judiciary exclusively, but it is in the transition from the legal function of decision to the economic one of remedy—specifically, dissolution, divorcement and divestiture—that the difficulty and the danger arise. To the extent that the ultimate

102. See Rostow, *The New Sherman Act*, *supra* note 70, at 585: “When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown.”

103. THE STRUCTURE OF INDUSTRY, No. 27, 274-5 (1941).

104. That the decision in the *Columbia Steel* case augurs an era in which the Court will decide antitrust cases on the basis of “intelligent economic thinking” rather than on prior standards, see Zlinkoff and Barnard, *supra* note 52. Thus the decision will “furnish the Federal Judiciary with the most helpful criteria . . . [for] dealing effectively with the growing concentration of economic power which threatens to undermine and destroy both our political democracy and our system of private, free, competitive enterprise.” *Id.* at 175.

resolution of the problem of divestiture is left to judicial determination, it is recommended that the Court be advised in each case by a non-partisan board of economic experts.

Such a board, comprised of representative and qualified experts, would be called on to study both the facts of the case and the conditions in the industry, to report to the court on the effects on the national economy of the relief requested by the enforcement agency, and to make recommendations as to the maximum limits of any decree. These experts might well be representatives designated by each of the several departments of the government qualified to make recommendations in the light of the interests served by each cabinet officer. Thus, the interests of the Department of National Defense, of the State Department, of the Treasury Department and the Labor Department would receive consideration in the resolution of the problem presented.

The Court would, of course, remain free to accept or reject the report and recommendations of the board.

THE ULTIMATE RESPONSIBILITY

The extent and the nature of governmental trade regulation is a function the responsibility for which must in the ultimate be borne by the representatives of the people themselves.¹⁰⁵

There is much to be said for the proposition that a re-examination of American business problems should be made from time to time. It is submitted, however, that the examination, and any action based on it, are the function of the legislative branch of the Government. Judges and lawyers whose training and obligation direct them toward interpretation and enforcement of the law should not be left indiscriminately to make not only new laws as they go along, but also to reform the economy of the nation to suit their personal notions of economic or social justice. This is, indeed, conceded both by members of the enforcement agencies and by some of the judges themselves.

105. Encouraging judicial recognition is found in the recently decided *United States v. Columbia Steel Co.*, 334 U. S. 495, 526 (1948). There the majority said: "It is not for courts to determine the course of the Nation's economic development. . . . If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts."

Compare with this the enthusiasm of Mr. Rostow in hailing the "revolutionary speed" with which the Sherman Act has lately been transformed: "Recent decisions have given the Department of Justice its greatest opportunity . . . to seek enforcement of the law on a grand scale, and in ways which might produce not piddling changes in the detail of trade practice, but long strides toward the great social purposes of the statute." Rostow, *The New Sherman Act*, *supra* note 52, at 574. See also the pregnant language of Mr. Justice Douglas, speaking for four justices in *United States v. Columbia Steel*, *supra*, at 536: "Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy." That this suggests federal ownership, see Hendershot, *Monopoly Ruling*, N. Y. World Telegram, June 9, 1948.

The Antitrust Division has made it quite clear that it considers its function to be that of enforcing the antitrust laws indiscriminately, in the light of its own notions of what those laws prohibit—, and that that function must be fulfilled regardless of the effect upon our economy.

The Antitrust Division has recently urged:

“ . . . a purpose to advance the art is no defense to a charge of violation of the antitrust laws . . . Accordingly, resort to pleas of special necessity, the peculiar circumstances of an industry, good motives, or the beneficial influence of a monopolistic corporation or combination is unavailing. Where special circumstances exist which require a departure from free competition, only Congress has the power to decree such a variance.”¹⁰⁶

Similarly the courts frequently express the belief that it is their duty to enforce the laws regardless of the economic effects. The responsibility for changing the law, if such effects are not always desirable, lies with Congress. In *United States v. National Lead Company* the court rejected the defense that the only way for American companies to compete abroad in a cartelized world is through adoption of similar practices in international trade, and that the alternative will be a loss of foreign business:

“The validity of this argument has been the subject of congressional inquiry . . . That kind of inquiry, rather than a judicial one, is appropriate to the evaluation of the merits of the proposition. For the courts it is conclusive that Congress has not yet validated such a solution to the problem. . . . Only Congress, not the courts, may grant the required immunity.”¹⁰⁷

106. Brief for the United States, pp. 150-151, *United States v. General Electric Co.*, Civil No. 1364, D. C. N. J., 1949. That the Department's views in this respect are the complete antithesis of those it held a few years ago is eloquently evidenced by Thurman Arnold, who was Assistant Attorney General in Charge of the Antitrust Division at the time the above suit was brought. As Assistant Attorney General he said:

“At the outset I wish to emphasize that the Sherman Act does not condemn as unreasonable the business combinations necessary for the efficient mass production or distribution of goods.” (Address of Jan. 27, 1940.)

“ . . . the antitrust law . . . says to every private combination, ‘You may grow and use your power so long as you can justify that power in greater savings to the consumer because of increased efficiency, or some other purpose recognized by Congress or the common law.’” (Address of Feb. 1, 1940.)

“Indeed, we do not wish to destroy combinations which pass on savings to consumers through economical marketing methods or the efficiency of mass production. It is not size itself, but the creation of bottlenecks and toll bridges in the distribution of a product which is unreasonable under the law.” (Address of Sept. 13, 1939.)

107. 63 F. Supp. 513, 526 (S. D. N. Y. 1945). *United States v. Aluminum Co. of America*, 148 F. 2d 416, 427 (2d Cir. 1945):

The problem of monopoly in our economy is not in any sense diminished; there is no question but that the laws against illegal restraints of trade and ruthless business aggression must continue to be vigorously applied in the interests of free competition and of the consuming public. The urgent need is for an adequate, intelligent anti-trust policy; for fair, vigorous, impartial enforcement of the law.

At the same time it must be emphasized that antitrust action alone, no matter how vigorous or how successful, cannot solve pure economic problems. Governmental prosecutors should not be permitted to utilize these statutes in an attempt at such a unilateral solution. There are many other factors which must be considered. Attacks on bigness as such spring from the failure to realize that large size may be both the cause and effect of efficiency, and that efficiency may be a substantial factor in the success of our economy, in the higher standard of living of the workingman, and in the military security of our nation.^{107a} Prior to the adoption of its current anti-bigness policy, even the Antitrust Division conceded that business efficiency should not be the object of Governmental attack:

"This program does not stop the efficiency of mass production. . . . It condemns only the illegitimate uses of the privileges of organizations for purposes which cannot be justified. . . .

"We do not want to destroy efficiency. We do not wish to destroy great organizations. We only wish to compel such organizations to justify themselves as an aid to free trade."¹⁰⁸

This language has a strange archaic flavor in the light of the attacks by the Department in recent suits. Yet it is certainly un-

"True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. . . . Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbade all."

With this language Judge Hand rejected as irrelevant the attempt of the Aluminum Company to prove that its position in the aluminum market had been a beneficial one, that it had not received excessive profits, and that its prices had been reasonable.

United States v. Columbia Steel Co., 334 U. S. 495, 526 (1948): "It is not for courts to determine the course of the nation's economic development."

107a. For a brilliant discussion of the problems of size and concentration from the standpoint of the economist, see Adelman, *supra* note 4, at 1291-1304. And see Ericson, *Criterion of Corporate Bigness—Social Welfare*, Christian Science Monitor, Dec. 18, 1948, p. 15, col. 5.

108. Address of Thurman Arnold, "The Antitrust Laws and Agriculture," Feb. 1, 1940.

deniable that a single-minded attack on bigness as bigness is not the solution of our problems.¹⁰⁹

Other factors must be given a full measure of consideration, and for this reason decisions of governmental policy, particularly insofar as life or death sentences for American industrial units are concerned, should not be left exclusively to the judgment of the courts. Unless the antitrust enforcement program is made an integral part of the over-all economic program it may conceivably work in a direction diametrically opposed to our primary objectives.

The foregoing considerations suggest the conclusion that there is need for a constant consideration and review of the antitrust program and the antitrust laws by the Congress. It was the Congress which declared its policy of preserving competition by its enactment of the Sherman and Clayton and related acts many years ago. The scope, the interpretation, and the practical effect of these statutes in this entire field have varied considerably through the years with changes in administration and in the economic beliefs of the law enforcement officials and of the judges. These changes and trends have not been given adequate study and consideration by the members of Congress, with the result that the law enforcement agencies and the courts have been left free, in very great measure, to write un-edited text matter into the interstices of the antitrust statutes.

It is accordingly recommended that Congress establish a procedure for reviewing the antitrust problem, in coordination with the entire underlying economic program.

In order that the Congress may play a more realistic role in the shaping and evolution of the laws which it, itself created, it is recommended that a Joint Congressional Committee be designated to serve permanently in this field. The Committee should be assigned the responsibility of reviewing the antitrust laws, of studying the present scope which has been given to them, of reviewing the effective-

109. "No one contends that antitrust action alone will solve all of our economic problems. . . . Antitrust is a part, an important part, of the united effort which must be made in working toward economic solutions. Other policies on the part of government, business and labor must also contribute to the success of enterprise." "Significance of the Sherman Act," an address by Attorney General Tom Clark, Sept. 25, 1945.

The Policy Statement of Department of Justice issued May 19, 1939, reads:

"It will be generally agreed, that the statutes should be interpreted and administered . . . to the end that their great and beneficial purposes may be achieved without doing unnecessary harm to business and reputable business organizations. Hit or miss prosecutions, instituted without due consideration of all the facts or consequences involved, are harmful to business and government alike."

ness of the enforcement of the laws thus far, and considering the course into which the laws should be directed in the future.¹¹⁰

Such a committee could then influence a consistent governmental policy in regard to business relations—a policy founded on the broad base of consideration of the welfare of the nation as a whole.¹¹¹ In the event the Antitrust Division or the courts undertook to interpret or apply the Congressional statutes in a manner detrimental to the welfare of the public, or contrary to the intent of Congress, the Committee would be prepared to recommend that Congress reshape the law to remove the improper interpretation, or to correct mistakes Congress itself might have made in drafting the original law. In this way, therefore, the public would be assured for the first time that its interests would be given paramount consideration in the interpretation, the construction, and the application of the statutes which regulate American business and industry.

There is adequate precedent for this suggestion in the Joint Committee on Labor Management Relations created pursuant to the Labor Management Relations Act, Title IV.¹¹² This Committee, created to review the operation and interpretation of the act so that the nation's labor laws would function in accordance with the public welfare, was intended to review the application and enforcement of the act and to make suggestions for modifications of the law wherever necessary to suit the ends for which it was designed.

110. *Cf.* S. 241 as adopted June 10, 1948, by the Senate Interstate Commerce Committee, authorizing an inquiry "into the status of business enterprise in the United States." The Senate Judiciary Committee has adopted S. Res. 255, authorizing a general antitrust investigation.

111. *Compare* on a broader front the Employment Act of 1946, the major objective of which was the creation of an over-all economic policy. This Act created a three-man Council of Economic Advisers to prepare annual data on which the President can base an economic report and recommendations for legislation, which he is required to submit to Congress at the beginning of each calendar year. It also created the Joint Economic Committee composed of members of both houses of Congress, to analyze the President's report and to submit a report on which Congress could base its own program.

112. 61 STAT. 160, 29 U. S. C. A. § 191 *et seq.* (Supp. 1947).